THEORIES OF WATER LAW.

LIKE other things of general concern, water has been the subject of much legal thought, and different theories have been worked out. It appears therefrom that possible theories of water law take form according to certain underlying ideas. In this paper I will compare these ideas and the systems which grow out of them.

Existing or proposed systems of water law have one first elemental principle for all of them. In the beginning they have the same root in their attitude to running water as a physical substance. It is the idea that water running in streams and watercourses is not of itself the property of any person and cannot be. Although differing with regard to the regulation of the use of the water, yet the water itself, by all of them, and by probably all people, is considered not to belong to any person. This is expressed at the beginning by the Roman jurists, in the compilation of Justinian, as follows: "By natural law these things are common to all: the air, running water, the sea, and as a consequence the shores of the sea." In the same class are placed the wild animals of the forest, fish in the sea, gems on the seashore, the sea-water, rain and so on. They are under no man's domain in their wild state, and hence can be no man's property while in their original condition. In the terms of logic, they are "outside of the universe of discourse" when property is mentioned. They are *not* property, or, as has been said, they are in the "negative community." This is sometimes phrased that they "belong to the public" or to the "state in trust for the people." The Civil Code of California, § 1410, now uses the expression that waters "are the property of the people of the state." But for present purposes I only want to point out that all systems of water law adopt the elemental idea that running water while in its natural situation is not owned; that the law regulates the use of it, but that rights of flow and use are what the law recognizes, and not property in the water itself. The water itself is "common" or "publici juris." This is accepted to-day by courts, legislatures, and publicists alike. In the follow-

ing discussion I will use the phrase that running water is "common to all."

Developing from this foundation are certain possible systems of water law. The first which I will consider is what appears, at first glance, the most natural one; that is, the rule whereby everyone, like the beasts in the forest or the Indians on the plains, may take out freely from springs and streams what he wants, and that the first so to do shall have a prior right to continue to do so. This law of "Prior Appropriation," as it is called, is the chief law in the states west of the Mississippi Valley. It had its beginning in the early days of the state of California, when the region was an uninhabited frontier presenting a condition close to the primitive condition of the wild animals in the forest and the Indians on the plains. It was all an unowned, unclaimed and unguarded wilderness of vast extent, where everything was new and theretofore no rights existed. The California miners diverted streams from one locality in the wilderness where there was no mining to another locality where there was mining, and used the water for washing out the gold and for supplying the purposes of mining camps. From California it spread to other frontier regions, such as Nevada, Oregon, Idaho, Utah and so on, and came into application as the earliest system of water law in the West in any of these states.

Under this system the idea of a water-right was an idea of having possession of a portion of the flow of the stream. It was to protect the first possessor. It was called a possessory right and had the features of a possessory system. It was initiated by taking possession of a portion of the flow of the stream (that is, by diverting and carrying it to the place of intended use). The measure of right was the capacity of the ditch, as that measured the portion of flow taken into possession and for which his continuance in possession was to be protected. The point of diversion could be shifted up or down the stream, and was not fixed at any place. Nor could it be lost by non-use alone without relinquishment of the possession; the law allowed him to do what he willed with his own, and therefore he could abandon his possession if he chose, but it rested upon his own wishes in the matter, so long as he held possession. The foundation was his right to be protected in his possession simply because he came there first. Subsequent years

have been more careful in conditioning possession upon beneficial use, making actual use rather than capacity of the ditch the measure of it, and the place of use a permanent condition of it, and non-use a self-sufficient cause of loss of it. Still, so long as he continues his use, the prior appropriator has the better right to-day under this system and must have where it prevails. Priority is still the foundation of it. It is based upon the idea that water titles must be secure and certain. The system is secure and certain for the prior appropriator, and, while it gives much less security to the subsequent one, certainty in one respect is given to him also, namely, the certainty that he will get nothing until the prior rights are fed.

The system is eminently a pioneering system. It developed California and neighboring states, and is developing Canada and Australia, where it is also in force. The pioneer gambles for high stakes, and if the rewards are limited he won't begin the game and put much money in it. The law has said to the pioneer, "Go take the water and make the farms fruitful and develop the mines and the water powers, and you shall always have the first right in the stream." He has accepted the offer, invested his capital, planted his land and is reaping his harvest.

When, however, full appropriation has been reached, priority diminishes the number of uses thereafter. The days of the pioneer have gone very largely — certainly the days of the individual pioneer with small-scale operations. Pioneering to-day is done more with the capital of New York, London and Paris than by frontiers-men with pick and shovel for their own private account. When, fifty years ago, a man appropriated water for his farm, from a stream of any considerable size, he left a surplus in the stream for others to appropriate; but to-day there are hundreds of appropriators on the most considerable sources of supply, and when another comes along on such streams he threatens the security of those who have gone before. This is already a common situation upon many western streams. I do not in this refer merely to the notices of appropriation of which so much has been said in the press. Those notices plaster the streams of California and probably throughout the West from source to mouth, and are mostly lapsed long ago. I refer by "appropriation" to actual diversions now in actual use, and this actual use, say the courts of a number of

states, has exhausted the supply of many of the large streams already.[1]

The question then becomes, what is to be done for the future where the streams have been wholly appropriated and put into use? Under the law of prior appropriation, so long as unmodified, appropriation itself comes to an end. Instead of carrying out the primitive idea that the water is *publici juris*, or the common property of all, it overthrows that idea by giving its use exclusively to those who have appropriated the water in the first place. Instead of being open to free use, the door is shut to all who have not already passed in. And indeed as between those already within the door, if a shortage now comes, even their numbers are cut down. The earliest appropriators are protected against the later, although, as the Supreme Court of Oregon has put it, it may be the lion's share, and none may be left for those who come later.[2]

The idea of common right, however, would require the deficiency to be apportioned among existing users at least. Let us consider it first as between existing users, those already within the door. Take a case where a stream has been settled upon for a generation and is in full use, where all use the water economically and a dry season comes. They look over the forgotten records and get the gossip of the old-timers and find that ten or twenty owners can establish priority. These get their full supply (the shortage leaves no supply after them) and one hundred or more others see their crops waste away while the favored ten or twenty mature beautifully. Under the law of prior appropriation this has happened many times in Southern California. This is hardly fulfilling the idea of "common right" with

[1] "All the waters of the South Platte River have been appropriated, and the entire normal flow of the river is inadequate to supply the priorities for irrigation purposes already decreed from it." Comstock *v.* Ramsay (Colo.), 133 Pac. 1107 (1913).

Many Colorado streams are already over-appropriated, says the court in Humphreys T. Co. *v.* Frank, 46 Colo. 524, 105 Pac. 1093 (1909). The entire Boise River in Idaho has been appropriated, says the court in United States *v.* Burley, 172 Fed. 615 (1909).

"The rapid increase of the irrigated area, adjacent to the watercourses in every part of the state has drawn so largely from our water resources that from some streams permits can no longer be granted, and upon several others only after storage has been provided as a supplemental supply for at least a part of the season." Report of the State Engineer of Wyoming, 1911–1912, page 15.

[2] Caviness *v.* LaGrande Irr. Co., 60 Ore. 410, 119 Pac. 731 (1911).

which the law begins. It is certainly not a system of common right that one hundred farmers along the stream suffer for water while ten or twenty farmers get it all. To follow out the idea of common right in such case the water, instead of going to the earliest appropriators, would be apportioned among all existing users of it.

Should this apportionment be made? If it is, the principle of priority is seriously cut down. And this principle of apportioning deficiency among existing users, which is in direct opposition to priorities, presents a distinguishing feature of the second system of water law. This second system is the common-law system, and gives rights in a stream ratably to all persons owning land along the stream, and recognizes no priorities in anyone. It is the system known as Riparian Rights. According to both the civil law of Europe and our common law, all whose lands border upon a stream have equal rights to have the benefit of the water supply. Superabundance of water allows each such owner to make the fullest use he pleases on his bordering land; but when there is a deficiency the common law is a system of enforcing apportionment thereof. These bordering landowners, or "riparian owners," share the water ratably and no one of them gets a preference over the others in the eye of the law. While the system of prior appropriation is a system of exclusive rights whereby the prior appropriator may exclude all others to the extent of his priority, the common-law system is one of correlative rights, as it is called, whereby the rights of landowners bordering upon the stream are interdependent and adjustable or relative to each other, so as to put them upon an equal footing in times of deficiency.

Which system is preferable between existing users? Unquestionably it can be answered that for pioneering the first system is preferable. The pioneer gambles for high stakes, and unless those large stakes are secured to him after he succeeds, he will not gamble, and there would be no pioneering. Besides under a correlative system, based upon the obligation to share the supply, there is an inherent uncertainty among all as to how much will be theirs in the apportionment of a deficiency.[3] The pioneer has a right to

[3] "The extent of a riparian owner's right to the use of water for irrigation is necessarily indefinite, uncertain, and subject to fluctuations, as it must always be dependent upon the future like needs of other riparian owners, as there can be no priority of right between them, and no riparian ownership of a definite amount of water

say, "Take away my water, and the land for which I braved hardships will revert to a desert." And this complaint of the pioneer cannot be denied.

But if we look at streams already developed by many users, after the pioneer has passed away, we find a community of farmers to whom dates and order of settlement along the river are ancient history and largely forgotten. The successor of the oldest user may say, "Cut off the water for one year, and my land will revert to a desert." But it sounds otherwise now, because, of course, the law of prior appropriation does not prevent that reversion to desert. Land reverts to desert upon shortage of water under every law; the only thing the law of prior appropriation does is to visit the loss wholly upon the subsequent appropriators, who now constitute most of the water users.

Still, western lawyers and engineers will almost unanimously declare for the enforcement of priorities. In the first place they say that the hardship and loss to the later users in such cases do not come from injustice, but come from nature withholding its full supply that year, and nature is far more cruel than man; that the subsequent users, having taken rights dependent upon nature for their existence, must blame nature and not man when the bounty is withheld. But to me that is not valid upon well-settled streams, after pioneer conditions have disappeared, and when priority becomes only a technicality which is forgotten except in times of trouble. Water is a common necessity of the community which a given source of supply serves, and it is neither practical nor desirable to tell people to keep away from using water supplies unless they know for certain that a dry year will never come. People will and should use all the water there is in normal years, and industry cannot stand still, shrinking at some unforeseen calamity in the future. No blame can be justly attributed to the later users.

However, any idea of forcing apportionment or sharing deficiency to secure equality is held to mean confiscation of the priorities of the prior appropriators, if they were thus forced to share with later ones when a deficiency comes. To attempt it would, it is sometimes said, cause an uprising. Such doctrines taken hold

as against other riparian owners." Little Walla Walla Irr. Union *v.* Finis Irr. Co., 62 Ore. 348, 124 Pac. 666 (1912).

of by politicians could, indeed, become dangerous, however promising to the needy. We are not ready to see all men leveled to the same state in life, living by set form, and kept down to like fortune by public force. But it does not seem that the doctrine of apportioning deficiency of water is an extreme doctrine of that kind (if we omit the assumption that it would fall into bad hands), in view of the simple fact that it is the doctrine of the most widely applied water law of any — the common law of riparian rights. It is applied in this country, except in the far West, and applied in England, and also in countries which have drawn their law from the Code Napoléon. So far from being arbitrary and confiscatory the doctrine of the common law was early said by Justice Story (in a case where he decreed an apportionment) to be merely a rule for the public convenience and general good,[4] while in a Texas case, for example, this common-law system was said to be "but the rule of universal right and common justice, and stands in need of no sanction to give it authoritative force." [5] Since, consequently, apportionment in times of deficiency has been acquiesed in by a large part of the world, I suppose it could be peaceably done with us. Some forcible expressions to that effect have been made with reference to appropriation.[6] It has also been made the basis of actual decision as between appropriators by Judge Morrow of the United States Circuit Court of the 9th Circuit.[7] This case involved a stream flowing from California into Nevada, which had been very early settled upon. The users were numerous, and the records were in confusion. To have attempted to sift out the priorities between the various appropriators, situated in two states, would have been a very large task and not wholly possible, and when done would

[4] Tyler *v.* Wilkinson, 4 Mas. (U. S.), 397 (1827).

[5] Fort Worth, etc. Co. *v.* City of Fort Worth (Texas), 158 S. W. 167 (1913).

[6] The Supreme Court of the United States said in a frequently quoted passage in Basey *v.* Gallagher, 20 Wall. (U. S.) 670 (1875): "Water is diverted to propel machinery in flour mills and sawmills, and to irrigate lands for cultivation as well as to enable miners to work their claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say *within reasonable limits*, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood of its use, and vest an absolute monopoly in a single individual."

[7] Anderson *v.* Bassman, 140 Fed. 14 (1905).

have left a large number of users without water. Judge Morrow consequently apportioned the water among all, without regard to their priorities, expressly saying that in his view the question of the priorities of the original settlements along the river was unimportant. The Supreme Court of California has adopted this as the rule for underground water.[8] Likewise, as between consumers of water for irrigation from public service distributing canals, the Railroad Commission of California has adopted the rule of apportionment in times of deficiency.[9] And likewise, also, there is the application to appropriators of the principle of "rotation," whereby each appropriator is assigned the entire flow for a period of time. His priority is recognized to the extent of giving him more or less of the time, but is disregarded in so far as priority, if fully enforced, would give the prior appropriator his full amount at all times, without reference to the needs of others. Rotation is going into practice among appropriators with the sanction of such courts as the Supreme Court of California, the Supreme Court of Idaho and the Supreme Court of Oregon.[10] So that the doctrine of making exist-

[8] "The objection this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law." Katz *v.* Walkinshaw, 141 Cal. 136, 74 Pac. 772 (1903).

[9] "It is also well established in this state, contrary to the doctrine of most of the other Western states, that in the case of a public-service water company, at least as between consumers of the same class, there is no priority, and in times of shortage, the supply of water must be ratably apportioned." Palmer *v.* Southern California, etc. Co., 2 California R. R. Commission Decisions, 43.

[10] The Supreme Court of California in Hufford *v.* Dye, 162 Cal. 147, 121 Pac. 400 (1912), said: "If there is not water enough (and this appears to be the fact) to permit a diversion of the stream and a simultaneous use of part by both parties without injury, the court may by its decree fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights. In doing so, the court should recognize the paramount and primary right of the respondent to the first flow in a full ditch during the irrigating season as it may be required. . . . While this remedy of rotation and use of waters for irrigation purpose has been more generally applied as between riparian proprietors, in principle there is no reason why it should not be made applicable as between claimants by appropriation. It is applied between riparian owners to permit the beneficial use of the waters by all, and as by appropriation only the right to a beneficial use is acquired, there is no reason why, when it can be justly made applicable, the same rule of rotation should not be applied as between appropriators." See also State *v.* Twinn Falls Co., 21 Idaho 410, 121

ing appropriators' rights correlative, carrying apportionment in times of deficiency, is going on in conservative courts without causing disturbance, and, rather, with approval.

Conceding then, as it seems we must, that the idea of apportioning deficiency among existing users has nothing inherently dangerous, a serious question arises whether it would not, in practice, work back to the basis of priority of its own accord. A cogent illustration might be put. Assuming that the reader favors correlative apportionment on the lines just discussed, this case may be put. Suppose a water supply enough in dry years for 1000 acres. Suppose, for illustration, riparian rights did not exist. One hundred men take out the water and use it on 1000 acres. They plant trees and vines, and after six or seven years they have profitable farms and support their families in comfort. A few wet seasons ensue and the supply doubles. Along come 100 more men, who take the increase and use it on 1000 acres. The result would be that when the dry years come they would continue to take half of the water, depriving the first-comers and killing half their trees. After half their trees are killed again there would be but 1000 acres watered, but now divided among 200 families, twice the former number. None of them would again plant more acreage in trees, even in wet years; one loss of half their fortune would be lesson enough. So that where, before, there were 100 families with 10 acres each, there are now simply 200 families with 5 acres each. Assuming that originally it required 10 acres to support a family, then the 5 acres each now has would not do it. There would be a struggle for existence, the weaker would sell out, and in a few years 100 men would again have 1000 acres wet and 1000 acres would be dry. Human nature is so constituted and the strife for land is so fierce that this discounting process would inevitably take place. It is simply a matter of time until the scheme of apportionment defeats itself in practice.

This is a serious consideration. The picture is a true one and the conclusion cannot be denied. But, as put, it is not a normal case, and hence not an illustration of general application. It is not normal because it involves two assumptions that are out of the normal; that is, first it assumes unusually wet years to

Pac. 1039 (1911); Cantrall *v.* Sterling Mining Co., 61 Ore. 516, 122 Pac. 42 (1912); McCoy *v.* Huntley, 60 Ore. 372, 119 Pac. 481 (1911).

begin the illustration, and second a *cycle* of dry years to finish it. For a general illustration it should begin with assuming normal years rather than unusually wet years. We will then be considering only the users of water who were drawn there by the normal supply. The number of users would not be swollen by unusual conditions. We should also finish without assuming a prolonged cycle of dry years, as shortages do not go over a year or two as a rule. We have had cycles of dry years, lasting ten years or so, but that is exceptional. Apportionment may still effectually carry over a single dry year, or even two dry years. I rather think the movement of farm ownership is not so quick as that, and in the ordinary run of cases the normal supply will have returned before much change of ownership has resulted; so that I think apportionment of deficiency would work out as intended, oftener than it would defeat itself, — among appropriators from streams, just as much as among riparian owners, users of percolating water, and consumers from public-service canals, in all of which cases the rule of apportionment is now the law of California, at least.

For the purpose of this discussion, however, I do not undertake to further press either side of the matter. It has served to bring out the first aspect of the difference between the system of prior appropriation and the common law system of riparian rights, namely, that between existing users the former gives exclusive prior rights to the prior appropriator and his descendants and successors, while the latter is a system of correlative rights between all landowners along the stream without regard to priority.

To pass on, I assume, for the purpose of carrying the matter to new ground, that the correlative system is taken as preferable upon full-settled streams, and that the law of prior appropriation is being modified to enforce a pro-rating of the supply among existing users in times of deficiency. By this modification, the idea of "common right" in water with which the law of prior appropriation started out, but seemed to contravene in times of deficiency, is to a considerable extent revived and given continued force, but yet not to the fullest extent of the matter, because it has still left out the idea of new parties getting new rights in the stream. Even if existing users are placed upon an equality instead of priority, the water will still be devoted to only a comparatively small part of the community living within the drainage region. If the water

is common to all, then, to carry out the idea of common right consistently, newcomers would have to be admitted to the use of the common supply, even though the supply is already in full use by others. The others would have to give up *pro rata*, and apportion some to newcomers. This has never, so far as I can now recall, been advocated, as between appropriators, anywhere in the West. On the contrary, it has been strongly condemned and ruled against, both in the courts and by others.[11] It would be bare socialism if it were extensively done. Nevertheless, the idea of "common right" in water is not complete unless it is done, and for developing the discussion I will consider what would be the result if it were done.

Suppose that we intend to force an apportionment of the supply of existing users, in order to admit new users into an already fully used supply. We immediately meet the obstacle that the newcomer, desiring to exercise the common right in water, must have some means of getting at the water. If he owns no land bordering thereon, he must cross the bordering land of others to get there. Streams, of course, are wholly enclosed from source to mouth by somebody's land. There is no land in the state without some owner.

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[11] "To compel such a subdivision and distribution of water supplies as this construction would entail, would destroy the value of all water-rights. In this state the water supply is so small that large areas must go without irrigation entirely. Such water as there is must be applied, so far as it will go, in quantities sufficient to make the lands profitably productive. The principal benefit of irrigation comes from its use in growing vineyards and orchards. These require a large expenditure and a permanent water supply to make them profitable. *If those engaging in such enterprises know that they must be ready always to divide their water supply with those in the vicinity who may subsequently choose to engage therein*, such enterprise would be discouraged, the development, growth and progress of the state would be much retarded, and its productive capacity greatly decreased." Thayer *v.* California Development Co., 164 Cal. 117, 128 Pac. 21 (1912).

"This commission should take good care that, until these applicants improve their system, they admit no new domestic consumers except on the terms indicated, and that they admit no more irrigation consumers whatsoever. This is the kind of priority to which (we have heretofore held) being a member of a class for which a public use of water is created entitles such member of such class, *and he should be absolutely protected and his supply never diminished by additions to the class*, but merely by necessary and unavoidable failure of supply." In the matter of the application of Murray and Fletcher, 2 Cal. Ry. Com., 464 at 524.

The Railroad Commission had a *statute* passed thereafter confirming its power to make such order. Cal. Stat. 1913, Ch. 80, § 5. See Mordecai *v.* Madera Canal Co., Cal. R. R. Com. Dec. No. 1116, decided December 5, 1913.

That owner may be a farmer, or landed estate. It may be the United States, whose public domain covers one-half of California. Consequently the newcomer, demanding to be admitted into the use of the stream, if he owns land separated from the stream by the land of some other person, must get permission from that other person to cross the intervening land to get at the water that is to be apportioned to him. He must buy a right of access to the water in order to be admitted into a share of the common supply. To hold otherwise would mean not only "common right" in water, but common right to build ditches over anyone's land, and would mean common right in land as well as water. So long as there is individual property in land, this must be absolutely repudiated, and although it was once flirted with in Colorado, it is now disallowed there and in all other states, even those such as Colorado and Idaho, which have talked most of an ideal system of absolutely free enjoyment and appropriation of water. As a late example merely, I quote from the Supreme Court of Idaho:

> It is the appellant's right, by reason of his ownership of the land, to have exclusive possession of said land, and said owner is protected against any right that is attempted to be acquired by trespass thereon in the way of an attempt to appropriate the water running across said land, and neither the respondent nor any other person can divert such water without entering upon and leading it across the lands of the appellant, or using the lands of the appellant in distributing the power created by the use of such water, and committing a continuing trespass upon the premises of the appellant."[12]

Therefore, no matter what the law of waters may try to give, persons owning no bordering land of their own rest for an essential (the right of access) upon what they can buy, not upon common right. What they have is inextricably bound in with purchase; the law of common right in water is helpless to include them of its own force.

But the people bordering upon the stream are under no such impediment. They have natural access by force of their natural situation itself. The stream is right there for them to get at, and the common right in water is available to all of them without hindrance. As a system of law of "common right," then, carried to

[12] Marshall *v.* Niagara etc. Co., 22 Idaho, 144, 125 Pac. 208 (1912).

its conclusion, the owners of the enclosing bordering lands must be admitted as of common right at any time, and they exhaust the persons for whom admission can be demanded as of common right.

This is what takes place under the riparian system. The riparian system, regarding all landowners bordering upon the stream as upon an equal footing, enforces the admission of riparian owners, into the use with other riparian owners, although the one to be admitted never before used the water, and no matter how long he had failed to use the water (except, of course, in cases of prescription). And likewise the common law excludes non-riparian owners no matter how long the opposing riparian owner has failed to use the water himself. The common law keeps out non-riparian owners because there is no common right in land to give them access to the stream, and it forces the admission of riparian owners at any time, even though the supply is already in full use by other riparian owners, because they are on an equality with each other, and non-use is in either case immaterial. The riparian owners get the water as of common right, and what is of common right may, of course, be enjoyed at any time.

Is the riparian law socialism? The riparian law not only apportions deficiency among all existing users, but also forces admission into the use of future new riparian users at any time. It places all users upon an equality. Prior appropriation, on the other hand, is every man for himself, and is individualism in the highest degree. Is the riparian doctrine socialism? It certainly presses the idea of "common right" to its completion, and could not extend further in that direction so far as the water is concerned. It could be extended only by introducing "common right" in land too.

The riparian system has met with a flood of denunciation in the West. Half the Western courts, under what is called the "Colorado doctrine," have rejected it absolutely, calling it a "phantom" and the like, and part of the water bill now pending in California aims at abolishing it. Part of this loathing, one might almost call it, is due to its distortion when applied in an unsettled region, especially where there are large holdings of bordering land in a few hands, as in the case of Mexican grants in California. Such abnormal situations twist the system and make it as exclusive for a few owners, even though not using the water, as prior appropria-

tion ever could. But that is an opposition to the ownership of such large landholdings, rather than to the system as one of water law, and but a repetition of the denunciation of those land grants themselves.[13] In great part, however, the denunciation is also due to the sharing feature which forces the admission of new users into an already fully used supply, as a matter of common right, resulting in a permission of non-use at any time. Engineers say that they can plan no works when they cannot know how much water the law will allow them, because they will have to share it with other landowners along the stream who are not using it now but may start to do so in the future at any time. This side of the opposition, at least, seems to me to show that if the riparian system is bad, it is in some degree because socialism is bad.

As between these two systems, prior appropriation and riparian rights, the chief differences have now been brought out. Prior appropriation is every man for himself, with exclusive rights for the earliest and his descendants and successors, refusing to admit the public by any common right into an already fully used supply, and refusing even to apportion any deficiency among existing users to the derogation of the first in priority. The riparian system, on the other hand, carries "common right" in water so far as it can without introducing common rights in land also, and to all bordering or riparian landowners (excluding all non-riparian owners) gives a common right in the supply for use upon those lands, admitting any of them into the use although he had permitted his right to remain long in non-use, and even though thereby cutting down prior users in order to admit him; and, as between existing users, makes them bear ratably the loss when a deficiency comes.[14]

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[13] "Since this country became a part of the United States, these extensive rancho grants, which then had little value, have now become very large and very valuable estates. They have been denounced as 'enormous monopolies, princedoms,' etc.; and this court has been urged to deny to the grantees what, it is assumed, the former governments have too liberally and lavishly granted. This rhetoric might have a just influence, when urged to those who have a right to give or refuse. But the United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government; and this court has no discretion," etc. Mr. Justice Grier in United States *v.* Sutherland, 19 How. (U. S.), 364 (1856).

[14] In California both systems exist in this way: The riparian system is enforced for all bordering private landowners who choose to avail themselves of it. But, by federal statute, it is not in force for land of the United States, which comprises half of the area of that state, nor is it enforced for any riparian owners who do not seek it;

These two systems, one of which divides the supplies in severalty according to priority, and the other of which retains the supplies in common undivided, are comprehensive, and any new system can be but some variation of those ideas. The new system now being proposed is the licensing system. It involves mainly the system of prior appropriation, with conditions placed upon the acquisition of new priorities. This is already in force in numerous states. Some of the conditions are the payment of license fees, the making of reports to public officials, and the termination of the priority thereafter, as the public officials from time to time deem advisable. Such licensing system was enacted by the last California legislature,[15] and is now awaiting referendum vote. At bottom, the statute is based upon the idea of priority, and requires the officials to recognize priority to a very large extent; on the other hand, it recognizes that the doctrine of priority has, in some respects, worked unsatisfactorily and so as to require restriction of its operation.

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and from lack of acquaintance with it and other reasons not necessary to go into here, riparian owners very frequently ignore it. Under such circumstances the first to take the water away is prior in right against everyone except the riparian owners, and priority governs among such appropriators, and prior appropriation thereby goes on among appropriators quite actively, and after five years often bars the riparian owners themselves by prescription. But that, if called upon within the prescriptive period, California courts will enjoin the appropriator at suit of a riparian owner, and that the California courts will force the admission of a riparian owner into the use with other riparian owners even though he has not used the water for many years, see, merely as the most recent decision, Miller & Lux *v.* Enterprise C. & L. Co., S. F., No. 6061, decided December 20, 1913. Since this was written a rehearing has been granted, but not affecting the general principle. These principles have also been incorporated into recent rulings upon underground water. Burr *v.* Maclay Rancho & W. Co., 154 Cal. 428, 98 Pac. 260 (1908).

[15] Stat. 1913, p. 1012.